



## COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CRP172Nov15/AME067Jul16

In the matter between:

**The SA Gym Group, a *universitas personarum*,  
trading as Fit-SA**

**Applicant**

and

<b>Discovery Health Medical Scheme</b>	<b>First Respondent</b>
<b>Discovery Health Proprietary Limited</b>	<b>Second Respondent</b>
<b>Discovery Vitality Proprietary Limited</b>	<b>Third Respondent</b>
<b>Virgin Active South Africa Proprietary Limited</b>	<b>Fourth Respondent</b>
<b>Planet Fitness Proprietary Limited</b>	<b>Fifth Respondent</b>
<b>The Competition Commission</b>	<b>Sixth Respondent</b>

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Panel	: Norman Manoim (Presiding Member)
	: Medi Mokuena (Tribunal Member)
	: Mondo Mazwai (Tribunal Member)
Heard on	: 21 September 2016
Order Issued on	: 26 October 2016
Reasons Issued on	: 26 October 2016

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### Reasons for Decision and Order

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#### Introduction

[ 1 ] This matter concerns an application by The SA Gym Group, a voluntary association of gym clubs, trading as Fit-SA ("Fit-SA") to amend and supplement its complaint

referral in order to overcome an exception application filed by Virgin Active South Africa Proprietary Limited ("Virgin Active").<sup>1</sup>

[ 2 ] Only Virgin Active and Planet Fitness Proprietary Limited ("Planet Fitness") opposed the amendment application, and are hereinafter referred to as "the respondents".<sup>2</sup>

[ 3 ] For reasons we explain later, it has become moot for us to decide the amendment application. The only issue to decide is that of costs. Our decision and reasons in that regard follow.

### **Background**

[ 4 ] On 14 September 2015, Fit-SA filed a statement of complaint with the Competition Commission ("Commission") wherein it alleged that the first to fifth respondents had engaged in exclusive agreements in contravention of sections 5(1) and 8(c) of the Competition Act 89 of 1998.

[ 5 ] On 08 October 2015, the Commission served a notice of non-referral on the Applicant, and advised that it had found no evidence that the agreements between the first to fifth respondents were exclusive. Furthermore the Commission informed Fit-SA that its investigation had revealed, amongst other things, that Fit-SA did not meet the criteria to be part of the scheme and further that, there was evidence to suggest that Fit-SA could instead be accommodated through another program offered by Discovery, referred to as Discovery VitalityFit, a program which is allegedly designed specifically for small independent health clubs.

[ 6 ] Following the Commission's decision not to refer the complaint, Fit-SA on or about 04 November 2015, filed a complaint referral directly with the Tribunal in terms of section 51(1) of the Act.

[ 7 ] In particular, the conduct underlying the complaint referral, concerned agreements that the first to third respondents had concluded with Virgin Active and Planet Fitness respectively, in terms of which the first to third respondents subsidise their members' gym fees at each of Virgin Active's and Planet Fitness' gyms. Fit-SA submitted that

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<sup>1</sup>Planet Fitness did not formally file an exception application but associated itself with Virgin Active's exception application. See letter dated 15 January 2016, page 255 of the trial bundle.

<sup>2</sup>Discovery Health Medical Scheme, Discovery Health Proprietary Limited and Discovery Vitality Proprietary Limited attended the hearing only on a watching brief and submitted that they would abide the decision of the Tribunal.

no new gym companies have been afforded the same partnership and that Virgin Active and Planet Fitness continue to be the only two gyms which benefit from this subsidy scheme. This allegedly impairs the ability of independent gyms to compete effectively with Virgin Active and Planet Fitness as they are unable to match the significantly reduced rates offered by these gyms.

[ 8 ] On 06 January 2015, Virgin Active filed an exception application to Fit-SA's complaint referral on the grounds that the allegations contained therein did not disclose a competition law contravention by Virgin Active; alternatively, that such allegations were vague and embarrassing in that Virgin Active was unable to ascertain what case it was required to meet.

[ 9 ] On 03 June 2016, Fit-SA filed an amendment application in which it sought to overcome the grounds of objection contained in Virgin Active's exception.

[ 10 ] On 13 July 2016, Virgin Active filed an answering affidavit opposing the amendment application on grounds that the amended complaint referral still did not disclose a competition law contravention by Virgin Active; alternatively was vague and embarrassing in that Virgin Active was unable to ascertain what case it was required to meet. In essence, Virgin Active submitted that the amended complaint referral remained excipiable. Virgin Active prayed that the application be dismissed with costs.

[ 11 ] On 29 July 2016, Planet Fitness filed its answering affidavit opposing the amendment application on similar grounds to those of Virgin Active and prayed that the application be dismissed with costs.

## Hearing

[ 12 ] During the course of the proceedings it became increasingly clear that Fit-SA had failed to discern the case it was trying to make. In particular, it was not clear what theory of harm<sup>3</sup> the applicant espoused, i.e. whether the conduct Fit-SA sought to have prohibited was conduct upstream by the first and/or second and/or third respondents at the level of medical insurance service provision, or downstream at the gym services level.

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<sup>3</sup> See transcript page 6

[ 13 ] Having heard Fit-SA's opening arguments, the Tribunal questioned the probability of success of this application and afforded Fit-SA an opportunity to reconsider its position given that on the papers it was unclear what case the respondents were required to meet.<sup>4</sup> However, Fit-SA was adamant that its amendment had cured the deficiencies and requested to proceed to make submissions regarding the amendment application.<sup>5</sup>

[ 14 ] The respondents opposed the proposed amendments on the basis that they did not remedy the deficiencies contained in the complaint referral. They were of the view that even if the amendment application were to be granted, the complaint referral would remain excipiable on the grounds that it failed to disclose a cause of action against them and was vague and embarrassing. The respondents prayed that the application be dismissed with costs.

[ 15 ] Following a full day of hearing, Fit-SA eventually conceded that its papers (even if the proposed amendments were granted) needed further amendment.<sup>6</sup> In light of this, the Tribunal is no longer required to make a decision on the excipiability of the amendment application, except for the question of costs.<sup>7</sup>

### **Costs**

[ 16 ] Fit-SA submitted that costs should not be awarded against it, as procedurally, the respondents have not raised their exception on notice, but rather in their answering affidavits opposing the amendment application. Fit-SA submits that, had the exceptions been brought on notice as is practice in the High Court, it would have had an opportunity to respond to the exception and these proceedings could have been avoided.

[ 17 ] Virgin Active and Planet Fitness submitted that there was nothing irregular with the procedure they followed. This is because following Fit-SA's original complaint referral, Virgin Active filed an exception application (Planet Fitness addressed a letter to Fit-SA concurring with Virgin Active's exception application)<sup>8</sup>. Fit-SA then withdrew the

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<sup>4</sup> See transcript pages 19-20, see transcript pages 23-25

<sup>5</sup> See transcript page 28 lines 1-8

<sup>6</sup> See transcript page 121 lines 3-11, see also transcript, *inter alia*, page 36 line 16-25, page 44 lines 8-25 and page 45 lines 1-3

<sup>7</sup> Given that the applicant requested the Tribunal not to make a decision as to the amendment application, we do not go into detail regarding the arguments that were put forward in this regard and focus only on the issue of costs.

<sup>8</sup> See letter dated 15 January 2016 on page 255 of the trial bundle

referral against some of the respondents and filed an application to amend its original referral<sup>9</sup>, to which the respondents filed answering affidavits in which they opposed the amendment on grounds, *inter alia*, that the amended referral would remain excipiable.

[ 18 ] Virgin Active submitted that there was no prejudice to Fit-SA as, although it did not file another exception, it alleged in its answering affidavit that the amended complaint referral remained excipiable, an allegation Fit-SA was aware of.

[ 19 ] Furthermore, Virgin Active submitted that Fit-SA persisted with arguing the amendment despite the Tribunal's invitation to reconsider its position following the deliberations during the proceedings. Virgin Active submitted that, in the circumstances, the only appropriate remedy was a dismissal of the application with costs.<sup>10</sup>

[ 20 ] Planet Fitness concurred with Virgin Active and added that the costs should include the cost of two counsel against not only Fit-SA, but also its members jointly and severally.<sup>11</sup>

[ 21 ] It is trite that the Tribunal is an administrative body. As such, the Tribunal is not bound by High Court rules. This means our proceedings are informal, with the proviso that we act fairly. Although there is no specific provision in our rules for exception applications, we have previously heard them under rule 42 of the Tribunal Rules. However, in this case, it makes no material difference that the exception was raised in answer to the amendment application, and not on notice.

[ 22 ] This is because Fit-SA knew from Virgin Active's answer that it opposed the amendment on grounds that it did not cure the deficiencies in Virgin Active's earlier exception application, which had been brought on notice (and was not proceeded with as Fit-SA advised Virgin Active that it intended to amend its referral).

[ 23 ] It was open to Fit-SA, on receiving Virgin Active's answer, to reconsider its position regarding the amendment application, but it persisted with defending the amendment application, fully aware of Virgin Active's submission that the amendment remained excipiable. It was also open to Fit-SA to address this submission in reply but it did not

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<sup>9</sup> See Applicants Consolidated Notice of Motion page 87 of the trial bundle.

<sup>10</sup> See transcript page 83 to 84

<sup>11</sup> See transcript page 107, lines 1-6.

do so. We are, therefore, not persuaded that Fit-SA has been prejudiced by the manner in which the exception was brought.

[ 24 ] We find, therefore, that Fit-SA is liable for the respondents' costs. However, in our view, the costs of two counsel are unwarranted in the circumstances of this case. We also have found no basis to grant a cost order against individual member gyms of Fit-SA, as contended for by Mr Symon, as they did not appear before us in their individual capacities.

[ 25 ] We therefore make the following order.

#### **Order**

[ 26 ] Fit-SA is granted leave to amend its complaint referral affidavit.

[ 27 ] Fit-SA is liable for the costs of the fourth and fifth respondents in the amendment application, on a party and party scale, including the cost of one counsel.

  
Ms Mondo Mazwai

26 October 2016  
**DATE**

#### **Mr Norman Manoim and Ms Medi Mokuena concurring**

Tribunal Researcher:	Karissa Moothoo Padayachie
For the Applicant:	Adv Quentin Donaldson instructed by Higgs Attorneys
For the First Respondent:	Wade Graaff from ENSafrica
For the Second and Third Respondents:	Ryan Goodman from ENSafrica
For the Fourth Respondent:	Jerome Wilson S.C. instructed by Webber Wentzel
For the Fifth Respondent:	Shem Symon S.C. and Adv Kendall Turner instructed by Tugendhaft Wapnick Banchetti and Partners
For the Commission	The Commission was unrepresented